

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

<b>In the Matter of</b>	)	
	)	
<b>Draft Environmental Notice Requirements</b>	)	<b>WT Docket No. 08-61</b>
<b>and Interim Procedures Affecting the</b>	)	<b>WT Docket No. 03-187</b>
<b>Antenna Structure Registration Program</b>	)	

**COMMENTS OF THE COMMONWEALTH OF VIRGINIA DEPARTMENT  
OF STATE POLICE IN RESPONSE TO THE DRAFT ENVIRONMENTAL NOTICE  
REQUIREMENTS AND INTERIM PROCEDURES  
AFFECTING THE ANTENNA STRUCTURE REGISTRATION PROGRAM**

The Commonwealth of Virginia Department of State Police (“Commonwealth”), by its counsel, hereby submits comments in response to the invitation for comment by the Wireless Telecommunications Bureau on new requirements and procedures for communications towers.

**INTRODUCTION**

The Commonwealth’s Statewide Agencies Radio System (STARS) is a statewide, narrowband, interoperable land mobile radio network designed to support public safety, public service and homeland security needs. STARS provides twenty-one Virginia state agencies with a public safety grade statewide integrated voice and data communications system.

To provide statewide radio coverage at a public safety grade, STARS utilizes microwave communications towers throughout the state. To meet anticipated future coverage, and improve areas of weak land mobile radio signal coverage or limited channel capacity, the Commonwealth expects that it will need to install additional STARS towers in the future, or relocate existing facilities. All existing STARS towers are under 450 feet above ground level (AGL) in height, and it is anticipated that any future STARS towers would similarly be under 450 feet AGL.

## COMMENTS

The Commonwealth believes that the proposed regulations need to contain an exemption for state-owned facilities such as STARS with towers under 450 feet in height which are used for public safety purposes.

While the Commonwealth has read *American Bird Conservancy v. FCC*, 516 F3d 1027 (D.C. Cir. 2008), and appreciates the need for the Commission to modify its rules following that decision, we believe that a narrower, more tailored approach is required which does not unduly infringe on state public safety concerns or sovereignty.

Specifically, the Commonwealth believes that state public safety communications towers under 450 feet AGL should be exempt from the new requirements for a variety of reasons:

1. Security. The STARS system is specifically exempt from Virginia Freedom of Information Act requirements, Va. Code § 2.2-3705.2.14, as a public safety communications system, since the impact of any terrorist attack could be magnified if terrorists (targeting the Pentagon, CIA Headquarters, the Norfolk Navy Base or Hampton Roads Tunnels, for example), also know the exact location of STARS communications towers. Public safety communications towers are typically not protected or guarded, or designed to withstand attack. Any terrorist group wishing to attack a major national military target (such as the obvious Virginia targets noted above) could simultaneously attack the nearest communications towers, and ensure that any state post-attack public safety communications, rescue, and suspect apprehension efforts would be completely disrupted. The State Police tower site at Columbia Pike was instrumental in the recovery efforts of the 9/11 Pentagon attack and Department of Transportation's use of that same tower in evacuating the immediate area and Washington DC that day. The Supreme Court of the United States, in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,

454 U.S. 139 (1981) recognized that information protected from disclosure under the federal Freedom of Information Act, such as information that should be kept secret in the interest of national security, is exempt from the public disclosure requirements of the National Environmental Policy Act (“NEPA”).

A requirement that the exact location of proposed antenna structure registrations be publicized in a local newspaper could be damaging to state and national security.

2. Under 450 Foot AGL Towers. The Commission has correctly recognized that 450 feet is a logical dividing line for tower environmental impact and has drawn a distinction in the proposed Note to Section 47 CFR § 1.1307(d) between towers over 450 feet in height, which will require an automatic Environmental Assessment report, and towers of 450 feet or below, for which a newspaper notice is required to give the public an opportunity to suggest that a major environmental impact may occur.

The Supreme Court, in *Weinberger*, cited the “twin aims” of NEPA: to inject environmental concerns into an agency’s decision-making process and to inform the public that such environmental concerns have been considered, but recognized that under certain circumstances, an agency might have to consider the environmental concerns but withhold public disclosure of any NEPA documents. 454 U.S. at 143. In establishing that towers under 450 feet shall not require an automatic Environmental Assessment report yet subjecting such towers to the public disclosure requirements under NEPA, the Commission has failed to follow the logic of the Court’s holding in *Weinberger*.

The Commonwealth would suggest that towers of 450 feet or less, at least when owned by a state and licensed for public safety purposes, should be treated as completely exempt through an exception to the environmental notification process.

The Commonwealth operates over 130 of these “shorter” towers for STARS public safety purposes. The Commonwealth has seen no evidence that these “shorter” towers cause any meaningful environmental impact upon migrating birds and its experience in years of tower operations since 1977 is that it is unusual to find dead or injured birds at the base of its towers.

The Commonwealth cannot say whether this lack of any environmental impact is solely a result of its “shorter” towers, or whether public safety frequencies at which the antennas on those towers transmit may be a factor; however, the result justifies a complete exemption for state-owned towers of 450 feet or less used for public safety purposes.

3. State coordination. The Commonwealth believes that the Commission should seek to coordinate environmental efforts under the NEPA with the Commonwealth, and not unduly intrude on the Commonwealth’s procedures and relationships with local citizens, in implementing the proposed changes.

The regulations of the Council on Environmental Quality, 40 CFR § 1506.2, provide in pertinent part that federal agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements, and requires that environmental impact statements describe how an agency will reconcile its proposed actions with any state laws.

In seeking compliance with 40 CFR § 1506.6(a), the Commission should consider state law cooperation and reconciliation under 40 CFR § 1506.2.

State action is normally exempt from NEPA; the state could presumably build a tower or other structure on state land without NEPA compliance, unless a federal funding or a federal permit were involved. The Commonwealth is not convinced that an antenna structure registration is necessarily a “major federal action” which triggers NEPA compliance. Even if it were, the

Commonwealth should be allowed to find a less intrusive way than a local newspaper advertisement to communicate with its local governments and citizens. Unless the Commission intends to pay for such advertising, the Commonwealth questions whether this requirement (particularly as print newspaper subscriptions decrease, and online access increases) is a reasonable requirement. The *American Bird Conservancy* decision strategy strongly suggests that an update of the Commission's website would be adequate notice to the public. 516 Fd. 1027, 1035. In the case of public safety towers such as STARS' towers, where confidentiality is an issue, the specific location for a tower should be redacted or shielded, merely identifying the county, city or town in which the antenna structure will be located.

More significantly, the Commonwealth would argue that the Commission can discharge its duty, with respect to public involvement, by working with state agencies such as the Virginia Department of State Police, and that by involving a state agency, the Commission has in fact met its obligation to involve the "public".


The Commonwealth believes that the Commission's proposed regulations should be amended to keep state-owned public safety towers under 450 feet categorically exempt, by adding a new exception to the environmental notification process as 17.4(c)(1)(vii), to avoid serious issues of public safety and federal-state relations which could otherwise be brought into question.

## CONCLUSION

The Commonwealth urges the Commission to exempt state-owned public safety communications towers under 450 feet AGL from the proposed notice and disclosure requirements for the reasons set forth above.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF STATE POLICE

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of May, 2011, a copy of the foregoing Comments of the Commonwealth of Virginia was sent by email to mania.baghdadi@fcc.gov and to fcc@bcpiweb.com.

A handwritten signature in cursive script, appearing to read "P E Broadbent Jr", is written above a horizontal line.

Peter E. Broadbent, Jr.